1995

State of Utah v. Bryan O. Rasmussen : Petition for Rehearing

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff/Appellee/ Respondent, v. BRYAN O. RASMUSSEN, Defendant/Appellant/ Petitioner.	:	Case No. 950521-CA

PETITION FOR REHEARING

Petition for rehearing from a decision of the Court of Appeals reversing and remanding for an evidentiary hearing and entry of findings concerning application of the gang enhancement to convictions for three counts of burglary, 3rd degree felonies, in violation of Utah Code Ann. § 76-6-202 (1995), and two counts of theft, 3rd degree felonies, in violation of Utah Code Ann. § 76-6-404 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee/ Respondent,	:	
v.	:	Case No. 950521-CA
BRYAN O. RASMUSSEN,	:	
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee/ Respondent,	:	
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INTRODUCTION

Appellant/Petitioner, Bryan O. Rasmussen, files this Petition for Rehearing pursuant to Rule 35, Utah Rules of Appellate Procedure.

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 76-3-203.1 (1995) provides:

> **76-3-203.1. Offenses committed by three or more persons -- Enhanced penalties.**
>
> (1) (a) A person who commits any offense listed in Subsection (4) in concert with two or more persons is subject to an enhanced penalty for the offense as provided below.
>
> (b) "In concert with two or more persons" as used in this section means the defendant and two or more other persons would be criminally liable for the offense as parties under Section 76-2-202.
>
> (2) (a) The prosecuting attorney, or grand jury if an indictment is returned, shall cause to be subscribed upon the complaint in misdemeanor cases or the information or indictment in felony cases notice that the defendant is subject to the enhanced penalties provided under this section. The notice shall be in a clause separate from and in addition to the substantive offense charged.
>
> (b) If the subscription is not included initially, the court may subsequently allow the prosecutor to amend the charging document to include the subscription if the court finds the charging documents, including any statement of probable cause, provide notice to the defendant of

the allegation he committed the offense in concert with two or more persons, or if the court finds the defendant has not otherwise been substantially prejudiced by the omission.

(3) The enhanced penalties for offenses committed under this section are:

(a) If the offense is a class B misdemeanor, the convicted person shall serve a minimum term of 90 consecutive days in a jail or other secure correctional facility.

(b) If the offense is a class A misdemeanor, the convicted person shall serve a minimum term of 180 consecutive days in a jail or other secure correctional facility.

(c) If the offense is a third degree felony, the convicted person shall be sentenced to an enhanced minimum term of three years in prison.

(d) If the offense is a second degree felony, the convicted person shall be sentenced to an enhanced minimum term of six years in prison.

(e) If the offense is a first degree felony, the convicted person shall be sentenced to an enhanced minimum term of nine years in prison.

(f) If the offense is a capital offense for which a life sentence is imposed, the convicted person shall be sentenced to a minimum term of 20 years in prison.

(4) Offenses referred to in Subsection (1) are:

(a) any criminal violation of Title 58, Chapter 37, 37a, 37b, or 37c, regarding drug-related offenses;

(b) assault and related offenses under Title 76, Chapter 5, Part 1;

(c) any criminal homicide offense under Title 76, Chapter 5, Part 2;

(d) kidnapping and related offenses under Title 76, Chapter 5, Part 3;

(e) any felony sexual offense under Title 76, Chapter 5, Part 4;

(f) sexual exploitation of a minor as defined in Section 76-5a-3;

(g) any property destruction offense under Title 76, Chapter 6, Part 1;

(h) burglary, criminal trespass, and related offenses under Title 76, Chapter 6, Part 2;

(i) robbery and aggravated robbery under Title 76, Chapter 6, Part 3;

(j) theft and related offenses under Title 76, Chapter 6, Part 4;

(k) any fraud offense under Title 76, Chapter 6, Part 5, except Sections 76-6-503, 76-6-504, 76-6-505, 76-6-507, 76-6-508, 76-6-509, 76-6-510,

76-6-511, 76-6-512, 76-6-513, 76-6-514, 76-6-516, 76-6-517, 76-6-518, and 76-6-520;

(*l*) any offense of obstructing government operations under Part 3, Title 76, Chapter 8, except Sections 76-8-302, 76-8-303, 76-8-304, 76-8-307, 76-8-308, and 76-8-312;

(m) tampering with a witness or other violation of Section 76-8-508;

(n) extortion or bribery to dismiss criminal proceeding as defined in Section 76-8-509;

(o) any explosives offense under Title 76, Chapter 10, Part 3;

(p) any weapons offense under Title 76, Chapter 10, Part 5;

(q) pornographic and harmful materials and performances offenses under Title 76, Chapter 10, Part 12;

(r) prostitution and related offenses under Title 76, Chapter 10, Part 13;

(s) any violation of Title 76, Chapter 10, Part 15, Bus Passenger Safety Act;

(t) any violation of Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;

(u) communications fraud as defined in Section 76-10-1801;

(v) any violation of Title 76, Chapter 10, Part 19, Money Laundering and Currency Transaction Reporting Act; and

(w) burglary of a research facility as defined in Section 76-10-2002.

(5) (a) This section does not create any separate offense but provides an enhanced penalty for the primary offense.

(b) It is not a bar to imposing the enhanced penalties under this section that the persons with whom the actor is alleged to have acted in concert are not identified, apprehended, charged, or convicted, or that any of those persons are charged with or convicted of a different or lesser offense.

(c) The sentencing judge rather than the jury shall decide whether to impose the enhanced penalty under this section. The imposition of the penalty is contingent upon a finding by the sentencing judge that this section is applicable. In conjunction with sentencing the court shall enter written findings of fact concerning the applicability of this section.

(6) The court may suspend the imposition or execution of the sentence required under this section if the court:

(a) finds that the interests of justice would be best served; and

(b) states the specific circumstances justifying the disposition on the record and in writing.

The fifth amendment to the United States Constitution provides:

> **[Criminal actions - Provisions concerning - Due process of law and just compensation clauses.]**
>
> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The fourteenth amendment to the United States Constitution provides:

> **Section 1. [Citizenship -- Due process of law -- Equal protection.]**
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of las; nor deny to any person within its jurisdiction the equal protection of laws.

Article I, section 7 of the Utah Constitution provides:

> **Sec. 7. [Due process of law.]**
>
> No person shall be deprived of life, liberty or property, without due process of law.

ISSUES OF LAW WHICH NEED TO BE READDRESSED

1. The opinion incorrectly holds that the State is entitled to a second sentencing hearing where it may present evidence that it voluntarily declined to submit at the initial sentencing hearing, rather than merely remanding for findings based on the record already created.

ARGUMENT

POINT I. THE STATE FAILED TO MEET ITS BURDEN AT SENTENCING OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT MR. RASMUSSEN ACTED IN CONCERT WITH TWO OR MORE OTHERS, AND IS NOT ENTITLED TO A SUCCESSIVE EVIDENTIARY HEARING.

In its opinion, attached as addendum A, this Court found that the trial court failed to make written findings concerning the applicability of the gang enhancement as required by Utah Code Ann. § 76-3-203.1(5)(c) (1995). However, rather than remanding for the limited purpose of allowing the trial court to make findings based on the record already created, this Court remanded for a complete evidentiary hearing in addition to requesting the necessary findings.

There is nothing in the sentencing hearing transcript that indicates that the State was precluded from introducing any evidence it may have desired on the issue of gang enhancement applicability. R. 109 ("THE COURT: Mr. Gunnarson, the state have anything to add in this matter?" The State added a few comments, but did not call or attempt to call any witnesses). The State had its opportunity, but declined to present any witnesses or other

evidence at the sentencing hearing. The State should be bound by the evidentiary record it created at the sentencing hearing on August 4, 1995.

"[A] defendant is entitled to due process protections during sentencing to prevent procedural unfairness." State v. Gomez, 887 P.2d 853, 854-5 (Utah 1994) (citing State v. Bell, 754 P.2d 55, 58 (Utah 1988), and State v. Casarez, 656 P.2d 1005, 1007 (Utah 1982)). As a matter of both due process and simple logic, the factual predicate for a sentence needs to be fully developed before that sentence may properly be imposed. Because a proper factual predicate was not developed here, the enhanced sentence may not be imposed.

State v. Gutierrez, 864 P.2d 894 (Utah App. 1993) is controlling on the issue of remands for successive evidentiary hearings. Gutierrez involved an appeal of the trial court's refusal to suppress a confession taken in violation of Miranda. On appeal, the State requested a remand for an evidentiary hearing. This Court agreed with defendant that the authority relied upon by the State did not support a remand for an evidentiary hearing. 864 P.2d at 903. This Court[1] wrote:

> In contrast to Willett[v. Barnes, 842 P.2d 860, 863 (Utah 1992)] and [State v.]Strain, [779 P.2d 221, 227 (Utah 1989),] the trial court in this case directly ruled on the suppression issue, basing its ruling on all the evidence the State elected to submit, and this court has a complete transcript of the evidence submitted and the hearing at which that evidence was considered.[]

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[1]The Gutierrez opinion was authored by Judge Greenwood, with Judges Billings and Garff concurring.

> Having concluded that remanding this case would give the State an unprecedented opportunity to bolster or modify the prosecution's original argument, taking advantage of a retrospective critique by the State, we find no legal basis for the remand requested by the State.[] Furthermore, remand as requested by the State would not be sound judicial policy, as it would permit successive attempts to introduce evidence overlooked in prior hearings, thus preventing final conclusion of these proceedings. Therefore, we conclude that the State's request for a remand of this case is both legally and factually untenable.

Gutierrez, 864 P.2d at 903.

The same result should pertain here. The trial court here ruled, imposing gang enhancements, "basing its ruling on all the evidence the State elected to submit, and this court has a complete transcript of the evidence submitted and the hearing at which that evidence was considered."

Other case law is in accord. Cases discussing inadequate findings have not remanded for new evidentiary hearings. E.g. In re Estate of Quinn, 830 P.2d 282, 286 (Utah App. 1992):

> Unless the record clearly and uncontrovertedly supports the trial court's decision, the absence of adequate findings of fact precludes appellate review of the evidentiary basis underlying the trial court's decision and requires remand for more detailed findings by the trial court. See Woodward[v. Fazzio], 823 P.2d [474,] 478-479 [(Utah App. 1991)]; State v. Lovegren, 798 P.2d 767, 770-71 (Utah App. 1990).

Only where the trial court has denied a full and fair opportunity to be heard is an evidentiary remand appropriate. E.g. State v. Starnes, 841 P.2d 712, 716 (Utah App. 1992) ("Inasmuch as we conclude that Starnes was not afforded a 'full hearing' as required by statute, we vacate the restitution judgment entered and

remand for a full evidentiary hearing wherein Starnes can introduce his evidence.").

Here, at most the State is entitled only to a limited remand to allow the trial court to enter findings supporting the imposition of the gang enhancement, premised on the evidence previously adduced.[2] This Court should rehear this case and vacate that portion of its memorandum decision granting the State an evidentiary hearing.

POINT II. BECAUSE THE RECORD HERE IS LEGALLY INSUFFICIENT TO SUPPORT IMPOSITION OF GANG ENHANCEMENTS ON MR. RASMUSSEN, THIS COURT MAY VACATE THE GANG ENHANCEMENTS WITHOUT ORDERING A REMAND FOR ENTRY OF FINDINGS.

Where the record is sufficiently complete and clear, remand for factual findings is unnecessary and this Court may rule directly on the pertinent issue:

> Although the trial court did not make any findings as to the purpose or flagrancy of the officers' behavior, the record is sufficient for us to make this determination. See Sims v. Collection Div. of the State Tax Comm'n, 841 P.2d 6, 10 (1992); State v. Small, 829 P.2d 129, 130-32 (Utah Ct. App. 1992); State v. Castner, 825 P.2d 699, 704 (Utah Ct. App. 1992).

State v. Thurman, 846 P.2d 1256, 1273 (Utah 1993).

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[2]Because there is no evidence in the record on which such a finding could possibly be premised, see Mr. Rasmussen's reply brief at 6-12 (attached as addendum B), it would make sense to grant the trial court further authority to vacate imposition of the gang enhancement. Requiring the trial court to admit that there is no evidence supporting imposition of the gang enhancement, and waiting for an appeal from that finding before the enhancements may actually be vacated, is decidedly inefficient.

Here, there is no evidence supporting imposition of the gang enhancement. See Mr. Rasmussen's reply brief at 6-12, attached as addendum B. As a matter of judicial economy, this Court should vacate the gang enhancements imposed, rather than requiring the unnecessary intermediate step of requiring the trial court to make factual findings.

CONCLUSION

This case should be reheard. The State is not entitled to another sentencing hearing to present evidence it should have presented before. At most the State is entitled to remand for entry of factual findings. Because the record here is sufficiently clear, and there is no evidence to support imposition of the gang enhancements, this Court may vacate the enhancements directly.

As set forth in Rule 40(a), Utah Rules of Appellate Procedure, counsel's signature below operates as a certificate that this pleading is offered in good faith and not for any improper purpose, including but not limited to delay. See Rule 35, Utah Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 7 day of November, 1996.

ROBERT K. HEINEMAN
Attorney for Appellant/Petitioner

JUDITH A. JENSEN
Attorney for Appellant/Petitioner

CERTIFICATE OF DELIVERY

I, Robert K. Heineman, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 7th day of November, 1996.

ROBERT K. HEINEMAN

DELIVERED/MAILED this _____ day of November, 1996.

ADDENDUM A

Opinion in State v. Rasmussen, No. 950521-CA (Utah App. October 24, 1996).

10/24.

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee,	)	MEMORANDUM DECISION (Not For Official Publication)
v.	)	Case No. 950521-CA
Bryan O. Rasmussen, Defendant and Appellant.	)	F I L E D (October 24, 1996)

Third District, Salt Lake Department, Division I
The Honorable J. Dennis Frederick

Attorneys: Robert K. Heineman and Judith A. Jensen, Salt Lake City, for Appellant
Jan Graham and J. Kevin Murphy, Salt Lake City, for Appellee

Before Judges Orme, Billings, and Greenwood.

GREENWOOD, Judge:

Bryan Rasmussen challenges the constitutionality of Utah Code Ann. § 76-3-203.1 (1995) on federal and state constitutional grounds. A recent decision of the Utah Supreme Court, State v. Labrum, 293 Utah Adv. Rep. 19 (1996), mandates that we remand this case to the trial court for an evidentiary hearing and entry of findings, and precludes us from addressing the constitutional issues raised by defendant.

In sentencing defendant after acceptance of his guilty plea, the trial court did not conduct an evidentiary hearing, nor did it enter findings of fact supporting imposition of the section 76-3-203.1 gang enhancement sentence. The State has requested that we remand this case for an evidentiary hearing and entry of findings in accord with section 76-3-2-3.1, which requires that "[i]n conjunction with sentencing the court shall enter written findings of fact concerning the applicability of this section." Utah Code Ann. § 76-3-203.1(5)(c) (1995).

After the briefs were filed in this case, but before oral argument, the Utah Supreme Court issued Labrum, which specifically addressed whether a trial court must make findings in support of the imposition of section 76-3-203.1. The Labrum

court held that the trial court committed plain error because "no specific finding was entered with respect to the complicity of the other two persons who accompanied" the defendant. Labrum, 293 Utah Adv. Rep. at 21. Because the error was both plain and prejudicial, it was not waived by failure of the defendant to enter a timely objection. Id. We agree with the State that under Labrum the trial court's failure in this case to enter findings in support of the imposition of the section 76-3-203.1 sentence enhancement was plain error. Accordingly, we must remand.

Furthermore, without comment on the merits of the argument, a remand to determine whether defendant acted "in concert" under section 76-3-203.1 is appropriate even in the absence of Labrum. The State contends that defendant admitted to acting "in concert" with others and raises only a facial challenge to the statute. The State argues defendant cannot raise an as-applied constitutional challenge and is therefore also precluded from raising a facial constitutional challenge. See State v. Mace, 921 P.2d 1372, 1379 (Utah 1996) (holding that defendant did not have standing to raise facial constitutional challenge where statute did not apply to his factual circumstances). Defendant disputes the State's position, arguing that he did not admit that section 76-3-203.1 was constitutional as applied to his circumstances. After review, we believe the record is unclear on this issue, and therefore an evidentiary hearing and entry of findings is doubly appropriate.

Consequently, as in Labrum, we "remand to the trial court for further proceedings in compliance with [section] 76-3-203.1." Labrum, 293 Utah Adv. Rep. at 21. Upon remand, the trial court should hold an evidentiary hearing on the factual circumstances which support the imposition of section 76-3-203.1, and enter appropriate findings.

Pamela T. Greenwood, Judge

WE CONCUR:

Judith M. Billings, Judge

Gregory K. Orme,
Presiding Judge

ADDENDUM B

Excerpt from Mr. Rasmussen's reply brief, pp. 6-12, addressing lack of any evidence to support imposition of the gang enhancements.

examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

Article I, section 24 of the Utah Constitution provides:

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

ARGUMENT

POINT I. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT IMPOSITION OF THE GANG ENHANCEMENT HERE.

(Responding to State's brief at Statement of Facts at p. 5; Point I.B. (pp. 11-13); Point I.D. at p. 16; Point III.B. at p. 27)

A. MR. RASMUSSEN'S ADMISSION THAT HE ACTED "AS A PARTY TO THE OFFENSE" IS NOT AN ADMISSION THAT HE ACTED "IN CONCERT WITH TWO OR MORE PERSONS."

The State asserts that "[w]hen he pleaded guilty, Rasmussen admitted that he acted 'as a party to' the offenses (R. 43-45, 94-96), thereby admitting the factual predicate for the section 76-3-203.1 'in concert' sentence enhancement." Br. Appellee at 5. Mr. Rasmussen did in fact admit that he acted "as a party to" the offenses. However, this language merely tracks the usual formulation of charging informations. E.g. State v. Abeyta, 852 P.2d 993, 994 (Utah 1993) ("Ricky Brad Abeyta, a party to the offense . . ."); State v. Triptow, 770 P.2d 146, 153

(Utah 1989) ("GARY CHARLES TRIPTOW, a party to the offense . . ."); State v. Jamison, 767 P.2d 134, 135 (Utah App. 1989) ("James Jamison, a party to the offense . . ."). Copies of R. 43-45 and 94-96 are attached as Addendum A. Nowhere is there any admission that Mr. Rasmussen committed the crimes "in concert with two or more persons."

Mr. Rasmussen's pleas of guilty only admitted the underlying offenses, and said nothing about what sentences and possible enhancements would be applicable.[1] Mr. Rasmussen admitted nothing beyond the fact that he, individually, committed the underlying offenses. Section 76-3-203.1 requires a finding by the sentencing judge that the defendant committed the crime "in concert with two or more persons." Here, there was no evidence from which the trial court could reasonably make that finding.

The State's contention that Mr. Rasmussen's guilty pleas to only the underlying offenses also constitute an admission that the gang enhancement is applicable contradicts its entire argument in this case. Mr. Rasmussen contends that "in concert" activity is a separate element of a newly defined aggravated crime, and should be proven at trial with all the attendant due process protections, including the right to a unanimous jury determination by proof beyond a reasonable doubt. Br. Appellant, Point I (pp. 11-23). The State has steadfastly

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[1]It is, of course, permissible for a defendant to admit the factual predicate for any enhancement, but this did not occur in the case at bar.

opposed this contention. Memorandum Supporting the Constitutionality of Gang Enhancement Statute, R. 29-38 at 34 ("Sentencing under U.C.A. § 76-3-203.1 includes the determination that the defendant committed the criminal act in concert with two or more persons."). Mr. Rasmussen's pleas to the underlying offenses alone can only constitute an admission of the in concert activity if in concert activity is an element. If, as the State has argued, it is merely a sentencing consideration, then the plea to the underlying offense, by itself, cannot be an admission that the sentencing enhancement is applicable.

The State cannot have it both ways. If the in concert activity is a necessary element of a new offense, Mr. Rasmussen's motion should have been granted and he prevails here. If not, then his pleas to only the underlying offenses are insufficient to support application of the enhanced sentence, and the enhancements must be vacated.

B. TRIAL COUNSEL DID NOT CONCEDE THAT THE GANG ENHANCEMENT WAS PROPERLY APPLICABLE.

The State further asserts that Mr. Rasmussen "agreed" that the enhancement was applicable, citing to R. 105. Br. Appellee at 11. The page referenced by the State concerned the degree of the enhancement, if any, that was applicable in light of the fact that the theft charges, which were originally 2nd degree felonies, were reduced to 3rd degree felonies as a result of the legislature's amendment of the offense level classifications in Utah Code Ann. § 76-6-412 (Supp. 1995)

(effective May 1, 1995). See R. 57-8 (motion and stipulation to reduce category of offense), 59 (order).

Defense counsel did not agree that any enhancement should be imposed. The plea agreement does not indicate that any such admission was part of the bargain. Absent any such agreement as part of the plea bargain, defense counsel would violate his or her duty of loyalty and zealous representation by asserting that the client should receive a harsher sentence. State v. Holland, 281 Utah Adv. Rep. 3, 6 (Utah 1996).

C. THE GANG ENHANCEMENT HERE WAS APPLIED IN A PERFUNCTORY MANNER, WITH NO EVIDENCE TO SUPPORT ITS APPLICATION.

The State asserts that "[b]ecause Rasmussen never submitted the 'in concert' issue and the intent of his co-perpetrators to any adversarial testing, he cannot complain that the issue would have been perfunctorily decided, or too complicated for the trial court to decide, in his case." Br. Appellee at 11-12. This proposition rests on the incorrect notion that Mr. Rasmussen either admitted he acted in concert, or stipulated that the enhancement could be applied to him. To the contrary, no such admissions or stipulations are contained in the record.

Mr. Rasmussen appeared at sentencing, represented by counsel, and the matter of his sentence was subjected to adversarial testing. See August 4, 1995 Reporter's Transcript of Sentencing Proceedings, R. 103-112. For whatever reason, the State put on no evidence concerning any codefendants or uncharged

other actors, their actions, or their mental states. R. 109. The trial court's findings fail to identify any such other actors, what their involvement was, or the nature of their criminal *mens rea*. Based on the dearth of evidence before the trial court, no such findings could be made.

The sum total of what was before the judge concerning in concert activity consists of the bare allegations of the information, R. 7-11. The information, sworn to by Det. J. W. Prior, asserts:

> Alcohol, Tobacco and Firearms Agent Jeff Sarnacki will testify that on December 17, 1994, he interviewed defendant Cheeney. After being informed of his constitutional rights and freely agreeing to speak without an attorney present, defendant Cheeney admitted to all of the above conduct and that defendant Rasmussen had been involved with him. Defendant Cheeney also admitted that defendant Hoffman was involved in all but the Sundance Institute burglary and theft.

R. 11. Criminal informations are not evidence. If they were, there would be little need for preliminary hearings: the information could be used to establish by a preponderance all of the allegations. See State v. Pledger, 896 P.2d 1226, 1228 (Utah 1995) (probable cause standard is lower than preponderance standard).

Additionally, the information suffers from multiple hearsay problems. Det. Prior is reporting concerning information relayed to him by unknown means concerning statements allegedly made by co-defendant Cheeney to ATF agent Sarnacki. This information is at best triple hearsay, and as a matter of due process is insufficiently reliable to be relied on at sentencing.

State v. Johnson, 856 P.2d 1064, 1071 (Utah 1993) ("Although hearsay evidence can be admissible in a sentencing proceeding, double hearsay is so inherently unreliable and presents such a high probability for inaccuracy that it cannot stand alone as the basis for sentencing."). Bruton problems are likewise palpable: the information relies entirely on the confession of a co-defendant. Bruton v. United States, 391 U.S. 123, 125, 88 S.Ct. 1620, 1622, 20 L.Ed.2d 476 (U.S. 1968) (admission of co-defendant's confession at joint trial violated sixth amendment right to confrontation and cross-examination).

Fully marshalled, there is insufficient evidence to support imposition of the gang enhancements here. Even though Christopher Cheeney pleaded guilty to the Sundance Institute counts on September 8, 1995, this was more than a month after Mr. Rasmussen's sentence was imposed. See Statement of Defendant, Certificate of Counsel, and Order for Mr. Cheeney, R. 27-36 in Case No. 950720-CA, attached as Addendum B. Even if the court could somehow take judicial notice of future events,[2] the State would still be one actor short of showing action "in concert with two or more persons" on that charge. Appropriately, no gang enhancement was applied to Mr. Rasmussen on the Sundance Institute counts. Mr. Cheeney did not plead guilty to any of the three remaining counts, for which Mr. Rasmussen did receive gang enhancements.

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[2]This premise is, of course, patently absurd.

The gang enhancement in this case was applied in a most perfunctory manner, based on nothing more than the bare allegations of the charging information. Due process has been violated. The gang enhancements imposed must be vacated.

POINT II. UNDER McMILLAN, THE GANG ENHANCEMENT EXCEEDS THE FEDERAL DUE PROCESS LIMITATIONS OF OFFENSE DEFINITION AS THE TAIL (THE GANG ENHANCEMENT) IS WAGGING THE DOG (THE UNDERLYING OFFENSE).

(Responding to State's Brief at Point I.D. (pp. 15-17)

Under McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), the legislature's designation of "in concert" activity as a sentencing consideration rather than a substantive element violates due process. As explained earlier, the State's contention that Mr. Rasmussen never "demanded a factfinding procedure of any nature, by jury or otherwise," Br. Appellee at 16, is not well taken. First, Mr. Rasmussen requested that the trial court hold that the issue of "in concert" activity should be decided by a jury at trial. R. 25-6. Mr. Rasmussen did not waive sentencing; the State was required to establish a factual predicate for the application of the gang enhancement at the sentencing hearing. Having failed to do so, the enhancement is not applicable.

The State's contention that Mr. Rasmussen cites no authority, Br. Appellee at 16, is frivolous. McMillan is cited repeatedly, Br. Appellant at 13-15, 18, 19, and mandates that the statutory scheme here be held unconstitutional.